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8

9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11
12 **(HONORABLE BARRY TED MOSKOWITZ**

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 VS.

16 ISIDRO DIAZ-SANTACRUZ,

17 Defendant

18 **CASE No.: 07CR00415-LAB-1**

19 **DATE: 04/01/08**
TIME: 11:30 AM
JUDGE: BURNS
COURTROOM: 9

20
21 **POINTS AND AUTHORITIES RE: ISIDRO**
DIAZ-SANTACRUZ'S MOTIONS IN
LIMINE:

22
23 **(a) Disallow 609 Evidence Regarding**
Other Crimes;
(b) Allow Reference to Punishment
Enhancement

1 **POINTS AND AUTHORITIES RE: MOTIONS IN LIMINE**
23 **BACKGROUND**
45 ISIDRO DIAZ-SANTACRUZ is charged in an indictment with violating 8
6 USC 1325, Attempted Entry after Deportation.
78 **I.**
910 **MOTIONS IN LIMINE**
1112 **A. MOTION IN LIMINE RE: OTHER CRIMES AND BAD ACTS**
1314 *1. The conduct sought to be proven in other acts exceeds the limits set for
15 purposes for which evidence of other crimes, wrongs, or acts may be admitted.*
1617 The Government has not yet stated what its evidence will consist of.
1819 However if the Government seeks to introduce of other crimes with ISIDRO
20 DIAZ-SANTACRUZ committed, the court must scrutinize severely such evidence
21 sought to be introduced due to its ability to unduly prejudice the Defendant.
2223 If the Government introduces evidence of any transactions other than those
24 which are the subject of the indictment in order to show pattern of conduct the
25 defendant must be permitted to show transactions with the public over that
26 period of time in order to refute the pattern of conduct the Government is
27 alleging. This would lengthen the trial substantially. Additionally the defendant is
28 not charged with any crime involving any other crimes. The crime charged is
 specific to the crime that appears in the indictment.

1 The Court must be extremely careful to guard against the danger that a
2 defendant will be convicted because of proof of other offenses rather than because
3 he government has introduced evidence sufficient to prove beyond a reasonable
4 doubt that the defendant is actually guilty of the offense for which he is being
5 tried.

6 Such evidence must be narrowly circumscribed and limited. The criminal
7 conduct must in some cases be similar to the offense charged; and the conduct
8 must be introduced to prove an element of the charged offense that is a material
9 issue in the case and the defendant has to be connected to it. Otherwise minitrials
10 as to each other criminal transaction will occur. Even if a proffered item of
11 evidence can be pigeon-holed in a category, it must nonetheless be relevant to
12 establish an element of the offense that is a material issue. While proof of other
13 conduct may or may not be relevant with regard to relevant conduct, which
14 would be argued in a subsequent proceeding, the evidence must clearly show that
15 the defendant was aware of the other offenses and actively sought to bring about
16 its ultimate purpose.

17 *2. Even if other acts are relevant, they should be excluded as the prejudice
18 resulting from them outweighs their probative value.*

19 Rule 403 of the Federal Rules of Evidence provides that relevant evidence
20 "may be excluded if its probative value is substantially outweighed by the danger
21

1 of unfair prejudice (or) confusion of the issues." This balancing is mandated under
2 the 9th Circuit's 404(b) analysis:

3 Once the prerequisites have been satisfied, the evidence is admissible for
4 those purposes permitted by 404(b) if the court determines that the
5 probative value of the evidence is not substantially outweighed by the
6 danger of unfair prejudice.

7 Bailleaux, 685 F. 2d at 1110.

8 In undertaking the balancing analysis, "the trial court" should also consider
9 the need for evidence of prior criminal conduct to prove a particular point. *id* at
10 1112 (citations omitted). Thus, the evidence should not be admitted unless there is
11 an identifiable need for it.

12 Taking into account the potential for unfair prejudice and the lack of any
13 need for this evidence the court should exclude any Rule 404(b) evidence. Even if
14 any of the previously discussed acts are somehow marginally relevant to the
15 instant charge, the evidence should nonetheless be excluded as admission of these
16 incidents would tend to unfairly prejudice the jury against ISIDRO DIAZ-
17 SANTACRUZ. United States v. Shackleford, 738 F.2d 776 (7th Cir. 1984) citing 2 J.
18 Weinstein and M. Burger, *supra*, paragraph 404(16) at 404-93 footnotes omitted,
19 said a defendant cannot be identified as the perpetrator of the charged acts simply
20 because he has at other times committed the same commonplace variety of
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1 criminal acts except by reference to the forbidden inference of propensity. The
2 question for the court is whether the characteristics relied upon are sufficiently
3 idiosyncratic to permit the inference of pattern for the purpose of proof."

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5 The Government must come forward and meet its burden of proof and
6 show the reliability of this "evidence" before the court can make an appropriate
7 evaluation. Once it does, ISIDRO DIAZ-SANTACRUZ is satisfied that it will fail in
8 its effort. ISIDRO DIAZ-SANTACRUZ wishes to be tried on the facts of this case
9 and

10
11 not on other uncharged "events" that lack credibility, proof, reliability, and
12 inherent relevance. The stakes are far too high to permit anything less. Without
13 such "evidence" the Government may have a far more difficult time in proving its
14 case, and that is why it is seeking to bolster its allegations.

15
16 The Ninth Circuit Court of Appeals has recently re-affirmed that other acts
17 evidence is disfavored because "the defendant must be tried for what he did, not
18 for who he (or she) is. Thus guilt or innocence of the accused must be established
19 by evidence relevant to the particular offense being tried, not by showing that the
20 defendant has engaged in other acts of wrongdoing." *United States v. Mayans*, 17
21
22 F. 3d 1174 (9th Cir. 1994).

23
24
25 3. *Based upon the foregoing, ISIDRO DIAZ-SANTACRUZ respectfully*
26
27 *requests this honorable court to enter an order precluding the Government from*
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1 *offering evidence of any other criminal convictions an/or transactions other than*
 2 *those charged in the indictment.*

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4 **B. MOTION IN LIMINE RE: SENTENCING ENHANCEMENT**

5 *1. It is unconstitutional for this court to apply 18 U.S.C. §924(e) to*
 6 *ISIDRO DIAZ-SANTACRUZ as the same as a factual assessment, which increases*
 7 *ISIDRO DIAZ-SANTACRUZ's sentence and therefore may only be decided by a jury*
 8 *upon evidence established by proof beyond a reasonable doubt.*

9

10 ISIDRO DIAZ-SANTACRUZ contends the facts surrounding his prior
 11 conviction do not establish that he has the requisite number of the predicate
 12 conviction to trigger section 924(e)(1). Further, ISIDRO DIAZ-SANTACRUZ
 13 contends that this factual determination, because it doubles the penalty of the
 14 instant offense, must be submitted to a jury and proved beyond a reasonable
 15 doubt.

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17 ISIDRO DIAZ-SANTACRUZ acknowledges that this issue appears to have
 18 been resolved against him by the United States Supreme Court in Almendarez-
 19 Torres v. United States, 118 S.Ct. 1219 (1998). Nevertheless, ISIDRO DIAZ-
 20 SANTACRUZ raises the issue because Almendarez-Torres was decided by a five-to
 21 four majority and recent opinions by a member of that majority and by a majority
 22 of the Supreme Court indicate that Almendarez-Torres was incorrectly decided.
 23

24 See, Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

1 The factual determination of whether a prior felony conviction qualifies as
2 either a “serious drug offense” or a “violent felony,” as those terms are defined in
3 18 U.S.C. §§924(e)(2)(A) and (e)(2)(B), respectively, is an element of the offense of
4 possession of ammunition by a convicted felon in violation of 18 U.S.C. §922(g).
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6 The indictment, therefore, must allege as an element of the offense the one prior,
7 predicate felony conviction.
8

9 *2. An indictment must contain the elements of the offense charged and*
10 *fairly inform a defendant of the charge against which he must defend. Hamling v.*
11 *United States, 418 U.S. 87, 117 (1974).*

12 Rule 7 of the Federal Rules of Criminal Procedure echoes this condition in
13 its requirement that the indictment be a “plain, concise and definite written
14 statement with the essential facts constituting the offense charged.” Fed. R. Crim.
15 P. 7(c)(1). The Supreme Court has recognized the indictment’s role in warning a
16 defendant of facts that may enhance his punishment upon conviction. See, e.g.,
17
18 Jones v. United States, 526 U.S. 227 (1999).

19 On June 26, 2000, the Supreme Court issued its decision in Apprendi,
20 which addressed the constitutionality of an enhanced prison sentence under New
21 Jersey’s “hate crime” sentencing enhancement statute when a jury had not found
22 the operative “sentencing fact” beyond a reasonable doubt and, instead, the trial
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court simply had found the operative fact by a preponderance of the evidence at the sentencing hearing. The Supreme Court held that Apprendi's enhanced sentence was unconstitutional. In the course of the Court's reasoning in Apprendi, the Court stated that "it is arguable that Almendarez-Torres was incorrectly decided." Apprendi. In light of the majority's and Justice Thomas's opinions in Apprendi, ISIDRO DIAZ-SANTACRUZ position is legally correct.

3. Accordingly, this court should heed the Supreme Court's suggestion and limit Almendarez-Torres to its facts and demand that the Government prove the enhancement element beyond a reasonable doubt.

II.

CONCLUSION

For the foregoing reasons, the Defendant respectfully asks that the Court grant the Defendant's motions.

DATED: April 1, 08

SIGNED: *s/ Christian De Olivas*

CHRISTIAN DE OLIVAS

ATTORNEY FOR DEFENDANT
ISIDRO DIAZ-SANTACRUZ